(2) (3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Criminal Appeal No. 289 /2001

APPELLANT (IN JAIL) : PARDESHI S/o NARBDA PRASAD - KASHYAP AGED ABOUT 32 YEARS R/O INDIRA NAGAR , JANJGIR- DIST. JANJGIR - CHAMPA (C.G.)

VERSUS

RESPONDENT : THE STATE OF CHHATTISGARH. THROUGH P.S. JANJGIR- CHAMPA DIST. JANJGIR (CHHATTISGARH)

S.T. NO 123/99

Punishable U/S 302 of I.P.C.

Court of A.S.J. Janjgir Session part Bilaspur Hon'ble Shri R.P. Sharma .

P.S. - Janjgir - Champa, (C.G.)

CRIMINAL APPEAL U/S 374 (2) OF Cr.P.C.

2083 13-2-2001 Advocate

Vt. to AR

CONVICTION

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... C.R.A. 288/2001 **सन्** **200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench:

Hon'ble Shri L.C.Bhadoo, J &
Hon'ble Shri V.K. Shrivastava, J.

5-10-2006

Shri Azad Siddiqui, counsel for the appellant.

Shri U.N.S. Deo, Addl. Public Prosecutor with Shri D.K. Gwalre, Dy. Govt. Advocate for the State.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J.

By this appeal, the appellant has questioned the legality, propriety and correctness of the judgment of conviction and order of sentence dated 20-2-2001 passed by the Additional Sessions Judge, Janjgir, in Sessions Trial No.123/1999 whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of murder of his wife namely Nanki Bai, convicted him under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life.

The case of the prosecution, in brief, was that in the afternoon of 4-1-1999, the accused/appellant said to his wife Nanki Bai that he will not keep her with him and she can go to village Jarve, on which

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Nanki Bai asked him to send her children along with her. On this, the accused said to Nanki Bai that today he will kill her and picked up a plastic Jerrycan containing kerosene oil, poured the same on her body and set her on fire with the help of a matchbox. Nanki Bai was immediately taken to the Government Hospital, Janjgir, where she gave her statement i.e. *Dehati Nalishi* (Ex-P/24) to Smt. Sadhana Singh (PW-14), in which she narrated the above incident. Based on that First Information Report (Ex-P/25) was registered for commission of offence under Section 307 of the IPC. Thereafter on the request of the Station House Officer, Police Station Janjgir, Shri C.L. Markandey, Executive Magistrate (PW-15) recorded the dying declaration (Ex-P/7) at 5.45 p.m. on the same day. During the treatment Nanki Bai succumbed to the burn injuries on 10-1-1999, therefore, merg intimation No.4/1999 dated 16-1-1999 was sent to the Police Station by Bhawani Shankar Kutiya, Sub Inspector (PW-13).

The investigating Officer after giving notices (Ex-P/4) to the Panchas, prepared the inquest report under Ex-P/5 of the body of Nanki Bai. Site plan of place of occurrence was prepared under Ex-P/10. The Investigating Officer took into possession the liquid in a bottle. Sweater of accused was seized under Ex-P/14. Panchnama (Ex-P/15) regarding smell of kerosene on the sweater and on the

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hands of accused was prepared. Site plan (Ex-P/16) was also prepared by the Patwari. Seized articles were sent for chemical examination to the Forensic Science Laboratory, Sagar vide Ex-P/22 from where report (Ex-P/23) was received. Postmortem on the body of Nanki Bai was conducted by Dr. R. Jitpure (PW-16) and he prepared the postmortem report (Ex-P/27), in which he opined that cause of death was septicaemia shock due to burn up to 90% deep.

After completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Janjgir, who in turn committed the case to the Sessions Judge, Bilaspur, from where learned Additional Sessions Judge received the case on transfer for trial.

The prosecution in order to establish the charge against the accused examined 21 witnesses. On the other hand, statement of the accused was recorded under Section 313 of the Code of Criminal Procedure in which he denied the material appearing against him in the prosecution evidence and stated that he is innocent and has been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing the Additional Public Prosecutor and counsel for the accused/appellant, convicted and sentenced the accused/appellant as mentioned in para 1 of this judgment.

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Shri Siddique, learned counsel for the accused/appellant submitted that the prosecution has not been able to establish the motive of accused for commission of the crime. He also argued that as per postmortem report the burn injuries were up to 90%, therefore, in such a situation, it was not possible for Nanki Bai to give dying declaration. Learned counsel placed reliance on the judgment of Rajasthan High Court rendered in the matter of **CHANDRA DEVI & ANOTHER VS. STATE OF RAJASTHAN** reported in **I (2002) DMC 104.** He also argued that Budhwara Bai (PW-2), sister-in-law of the accused as also Golu @ Sandeep (PW-1), son of the deceased and the accused, who were in the house at the time of incident, have not supported the prosecution case, therefore, based on the dying declaration the conviction of the accused/appellant cannot be sustained.

On the other hand, Shri Deo & Shri Gwalre, learned counsel for the State, supported the judgment of the trial Court.

Having heard learned counsel for the parties, we have perused the record and judgment of the trial Court.

In this case, the conviction rests primarily on the dying declaration made by deceased Nanki Bai before Shri C.L. Markendey, Executive Magistrate (PW-15) as also the statement (Ex-P/24) given

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by her before Smt. Sadhana Singh, Sub Inspector (PW-14). Apart from that, there was kerosene smell on the sweater and on the hands of the accused.

As far as the question of motive is concerned, in the first instance, it is true that if the motive is established, then that is one of the strong circumstance for establishing the charge against the accused, but in the absence of proof of the motive also, if the ocular and strong circumstantial evidence is available, the conviction can be based on that. In the present case, in the dying declaration itself deceased Nanki Bai has categorically stated that accused used to doubt her fidelity, therefore, he used to beat & harass her and that is why on the fateful day the accused asked her to go to her village Jarve and when she asked him that she will go along with her children, the accused said that he will kill her, therefore, there was a motive behind the crime.

Now coming to the dying declaration made by the deceased, Shri C.L. Markandey, Executive Magistrate (PW-15) has categorically stated that on the fateful day he was working as Executive Magistrate in Janjgir. On the request of S.H.O., Police Station Janjgir, he went to the Government Hospital where Nanki Bai was admitted, he apprised Nanki Bai that he has come to record her

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statement, on which she disclosed her name and before taking down the dying declaration he enquired from Dr. U.C. Sharma, who gave a certificate that Nanki Bai was fit to give the statement. Thereafter, he recorded the statement, in which she disclosed that the accused set her on fire after pouring kerosene on her body.

Dr. H.R. Dharwani (PW-5) has stated that on 4-1-1999 he was working as Assistant Surgeon in Primary Health Center, Janjgir, on that day in the evening the Executive Magistrate came to record the dying declaration of Nanki Bai, he gave certificate that Nanki Bai was fit to give her statement and on the dying declaration (Ex-P/7) "A to A" bears his signature. The Executive Magistrate has also stated that Nanki Bai was in a fit stage of condition to give dying declaration. Apart from that, the said dying declaration was recorded within three hours from the time of incident and as per the record, Nanki Bai succumbed to the burn injury only on 10-1-1999, therefore, from the above evidence it can safely be held that Nanki Bai was capable of giving the dying declaration. There is no reason before the Court to disbelieve the evidence of Dr H.R. Dharwani (PW-5), Shri C.L. Markandey, Executive Magistrate (PW-15). They are Government officials and they had no animosity against the accused as such there was no occasion for them to create false evidence against the

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accused. Merely because the burn injuries were up to 90%, it cannot be said that in all cases where 90% burn injuries are there, the patient cannot give statement. The facts of judgment of Rajasthan High Court in the matter of **CHANDRA DEVI** (supra) cited by learned counsel for the accused/ appellant, are entirely different from the facts of present case. Even in para 17 of the said judgment it has been mentioned that "*the patient sustained 90% burns, but Dr. Y.N. Verma (PW-13) also stated that she was not in a fit condition to give the statement*", whereas, in the present case the Doctor has categorically stated that the patient was fit to give statement. As such, the judgment cited by learned counsel is of no help to the accused/appellant. Further the dying declaration is corroborated by the fact that Nanki Bai received the burn injuries in house of the accused and even on the sweater and hands of the accused there was smell of kerosene oil and in this connection, the memos (Ex-P/14 & Ex-P/15) were prepared by the Investigating Officer, in which it has been categorically mentioned that the smell of kerosene oil was present on sweater and hands of the accused. There is no explanation of the accused that how the smell of kerosene was present on his sweater and hands. It is also established that the accused was present in the house at the time of burning of his wife

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and there is nothing on record that he tried to save the deceased from burning. As per the FSL report, smell of kerosene oil was present on the clothes of deceased and accused, which were taken into possession by the police during investigation, therefore, this circumstance suggests the involvement of the accused in setting Nanki Bai on fire. It is true that Budhwara Bai (PW-2) and son of the accused and deceased namely Golu @ Sandeep (PW-1), a child of about 5 years, have turned hostile, but on the basis of this the prosecution case cannot be doubted because as per the dying declaration it is established that the accused set Nanki Bai on fire after pouring kerosene oil on her body.

For the foregoing reasons, we are of the considered opinion that there is nothing on record, which creates doubt in the truthfulness of the dying declaration and we do not find any illegality or infirmity in the judgment of the trial Court.

In the result, the appeal fails and the same is dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
V.K.Shrivastava
Judge

Gowri

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